
IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

INTERNATIONAL LONGSHORE-
MEN'S AND WAREHOUSEMEN'S
UNION (CIO) , et al.,

Appellants,

vs.

CABLE A. WIRTZ, as Judge of the
Circuit Court of the Second Judicial
Circuit, Territory of Hawaii, and
MAUI AGRICULTURAL COM-
PANY, LIMITED,

Appellees.

*Upon Appeal from the Supreme Court of the
Territory of Hawaii*

ANSWERING BRIEF OF
APPELLEE CABLE A. WIRTZ, JUDGE OF THE
CIRCUIT COURT OF THE SECOND CIRCUIT,
TERRITORY OF HAWAII

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JURISDICTION

The statement on jurisdiction made on pages 2 and 3 of Appellants' Opening Brief (hereinafter referred to as the opening brief, or abbreviated "Op. Br."), as amplified by the statement on pages 1 and 2 of the Answering Brief of Appellee Maui Agricultural Company, Limited (said company being hereinafter referred to as the appellee company

and its brief as the answering brief, or abbreviated "Ans. Br."), is adopted for the purposes of this brief in behalf of Appellee Cable A. Wirtz, Judge of the Circuit Court of the Second Circuit, Territory of Hawaii (hereinafter referred to as the appellee circuit judge).

STATEMENT OF THE CASE

To the statements of the case contained on pages 4 to 7 of the opening brief and pages 2 to 4 of the answering brief, the following is added as a basis for the argument in this brief.

The contempt proceedings referred to on page 4 of the opening brief are summary contempt proceedings charging violations of the temporary restraining order issued in the equity suit which the appellants herein seek to stay. The alleged violations, which occurred only a day after said order was issued, served and publicized, were brought to the attention of the appellee circuit judge by affidavits and motion filed in the equity suit. Thereupon, the matter was referred to the county attorney of the County of Maui, who subsequently instituted summary contempt proceedings for such alleged violations. Said contempt proceedings are still pending. Record 52-53, 93-99.

SUMMARY OF ARGUMENT

In view of the comprehensive consideration of the issues in this case so ably presented by counsel in the argument in the answering brief (Ans. Br. 9-94), with all of which we concur, we wish to adopt said argument in its entirety and to supplement it with a brief argument bearing on the contempt proceedings referred to in the preceding paragraph of this brief.

The points we wish to make are (1) that said contempt proceedings are criminal contempt proceedings, as distinguished from civil contempt; (2) that criminal contempt

proceedings are separate and independent proceedings and hence the pending contempt proceedings are not within the scope of the petition for writ of prohibition; and (3) the nature of criminal contempt proceedings is such that the determination of the issues in this case in favor of the appellants would not preclude prosecution of said criminal contempt proceedings.

ARGUMENT

1. The contempt proceedings pending before appellate circuit judge are proceedings for criminal contempt as distinguished from civil contempt.

It is generally recognized that there is a substantial distinction between criminal contempt and civil contempt, the fundamental difference being that in the case of civil contempt the purpose of the proceedings is remedial and for the benefit of the complainant while in criminal contempt proceedings the purpose is punitive and to vindicate the authority of the court and the public interest. *Gompers v. Bucks Stove & Range Co.*, 221 U. S. 418, 441; *Michaelson v. United States*, 266 U. S. 42, 64; *Lamb v. Cramer*, 285 U. S. 217, 220; *McCrone v. United States*, 307 U. S. 61, 64; *Nye v. United States*, 313 U. S. 33, 42; *United States v. United Mine Workers*, 330 U. S. 258, 302; *Penfield Co. v. Securities & Exchange Commission*, 330 U. S. 585, 590; *Fenton v. Walling*, 139 F. (2d) 608, 609 (cert. den. 321 U. S. 798); *Ando v. Ando*, 30 Haw. 80, 87; 12 Am. Jur. 392.

This basic difference in the purpose of contempt proceedings is reflected in a difference in the form of the proceedings. Proceedings for civil contempt are between the original parties and are instituted and tried as a part of the main cause while proceedings for criminal contempt are between the public and the defendant, and are not a part of the original suit but are separate and independent proceedings.

Gompers v. Bucks Stove & Range Co., supra, at 445; *Penfield Co. v. Securities & Exchange Commission*, supra, at 590; *Parker v. United States*, 153 F. (2d) 66, 70; *United States ex rel. West Virginia-Pittsburg Coal Co. v. Bittner*, 11 F. (2d) 93, 95; *S. Anargyros v. Anargyros & Co.*, 191 Fed. 208, 210. There are, however, variances from the rule, as in *United States v. United Mine Workers*, supra, where it was held that both civil and criminal contempt could be tried in a single proceeding in the main cause. 330 U. S. at 299. Nevertheless, such matters as the identity of the person by whom the contempt proceedings are brought and the title of the contempt proceedings are generally significant. Proceedings brought by the government through its prosecuting officer are almost invariably held to be criminal contempt proceedings. *McCann v. New York Stock Exchange*, 80 F. (2d) 211, 214 (cert. den. 299 U. S. 603); *Dunham v. United States ex rel. Kansas City Southern Ry. Co.*, 289 Fed. 376, 379; *Forrest v. United States*, 277 Fed. 873, 876 (cert. den. 258 U. S. 629); *Stewart v. United States*, 236 Fed. 838, 842; *Back v. State*, 106 N. W. 787 (Neb.).

Since the classification of contempt proceedings as civil or criminal depends upon the purpose of the proceedings, the prayer for relief is regarded as particularly significant and has been held to be determinative. *Gompers v. Bucks Stove & Range Co.*, supra, at 448; *Lamb v. Cramer*, supra, at 220; *Penfield Co. v. Securities & Exchange Commission*, supra, at 590. In other cases the prayer has been treated as only one factor in classification. *Forrest v. United States*, supra, at 876.

Various other factors have been relied on in determining the nature of particular contempt proceedings. For example, in *United States v. United Mine Workers*, supra, the wilfulness of the defendants' conduct and their policy of defiance were considered as supporting the conviction for criminal contempt. 330 U. S. at 303.

An extensive discussion of this problem of classifying contempt proceedings with an analysis of the factors relied on by the courts is contained in an article on the subject *Contempt of Injunctions, Civil and Criminal*, by Joseph Moskovitz, in 43 Colum. L. Rev. 780. For the purposes of this brief, the foregoing discussion is deemed adequate to determine the proper classification of the contempt proceedings in question.

Proceeding, then, to a consideration of said contempt proceedings with a view to determining the classification, we have in the record on this appeal a showing that the proceedings are summary contempt proceedings charging violations of the temporary restraining order issued in the equity suit which the appellants herein seek to stay, that the alleged violations on which the proceedings are based were originally brought to the attention of the appellee circuit judge by affidavits and motion filed in the equity suit, that thereupon the matter was referred to the county attorney and that subsequently summary contempt proceedings were instituted by the county attorney for such alleged violations. Record 52-53; 93-99.

The record does not contain the Information which instituted the contempt proceedings. Whatever may have been the actual reason for the exclusion, an examination of the pleading would show that it was properly excluded for the reason that the proceedings in question are for criminal contempt and accordingly a separate and independent action. A copy of said Information is included as an appendix to this brief for the purpose of facilitating this discussion.

Said Information was filed, it appears, in equity, but given a new number, No. 327 (Appendix, 13, 14), the number of the original equity suit being No. 325 (Record 47; Appendix, 14). The Information further shows that the proceedings were entitled *In the Matter of the*

Contempt of Court of Benjamin Awana, et al., and was brought in the name of the "TERRITORY OF HAWAII, by Wendell F. Crockett, Deputy County Attorney of the County of Maui" (Appendix, 13, 14), as distinguished from the main equity case which was entitled *Maui Agricultural Company, Limited v. International Longshoremen's Union (CIO) et al.*, (Record 23). It further shows that the alleged violations were charged to be "in open and wilful violation of said Restraining Order and in open and willful defiance and contempt of said Order and of [the] Court" (Appendix, 16). Lastly, the information shows that the prayer was for a rule upon the defendants to show cause "why they should not be adjudged guilty of and punished for contempt of * * * Court" (Appendix, 16-17).

It thus appears from the Information that a separate proceeding was brought in the name of the Territory by a duly authorized prosecuting officer charging a wilful violation of the order of the court and praying for punishment for such contempt. On the basis of the authorities hereinabove cited, such facts clearly show, it is respectfully submitted, that the proceedings in question are criminal contempt proceedings.

2. Criminal contempt proceedings are separate and independent proceedings and hence the pending contempt proceedings are not within the scope of the petition for writ of prohibition.

On page 3 of this brief, reference was made to the well-established rule that criminal contempt proceedings are separate and independent proceedings as distinguished from civil contempt proceedings, which are part of the main cause. On the basis of said rule, it is submitted that the pending contempt proceedings are not in issue in this case.

The petition in this case shows that the appellants herein seek to stay further proceedings in a certain cause (Record

20), which, as the exhibits referred to in and attached to and made a part of the petition show, is *Maui Agricultural Company, Limited v. International Longshoremen's & Warehousemen's Union (CIO)* (Record 17, 23, 36, 39). [On pages 36 and 39 and elsewhere in the record, the bracketed references to the court and cause are in error, the proper reference being the Circuit Court of the Second Circuit, Territory of Hawaii, and not the Circuit Court of Appeals.] The petition does not in any way refer to the contempt proceedings, nor is the Territory of Hawaii, the plaintiff in the contempt proceedings, made a party to this case. Hence, it must be presumed that the appellants are not seeking, by the petition in this case, stay of the contempt proceedings.

3. The nature of criminal contempt proceedings is such that the determination of the issues in this case in favor of the appellants would not preclude prosecution of the pending criminal contempt proceedings.

A consequence of the rule that criminal contempt proceedings are separate and independent proceedings as distinguished from civil contempt proceedings, which are part of the main cause, is that criminal contempt proceedings may be prosecuted regardless of the outcome of the main cause while civil contempt proceedings stand or fall with the main cause. *Gompers v. Bucks Stove & Range Co.*, supra, at 451; *United States v. United Mine Workers*, supra, at 294, 295; *Carter v. United States*, 135 F. (2d) 858, 860. Violations of an order are punishable as criminal contempt even though the order has been set aside on appeal (*Worden v. Searls*, 121 U. S. 14, 27; *Salvage Process Corp. v. Acme Tank Cleaning Process Corp.*, 86 F. (2d) 727), or though the main cause has been mooted by a settlement between the parties (*Gompers v. Bucks Stove & Range Co.*, supra, at 451). On the other hand, a settlement of the main cause or the reversal of the order in the main cause bars relief for

civil contempt. *Gompers v. Bucks Stove & Range Co.*, supra, at 451; *Worden v. Searls*, supra, at 26; *Bessette v. W. B. Conkey & Co.*, 194 U. S. 324, 329; *Salvage Process Corp. v. Acme Tank Cleaning Process Corp.*, supra; *S. Anargyros v. Anargyros & Co.*, supra, at 209.

It is therefore a well-established rule that an order issued by a court within its jurisdiction, even though the order be erroneous, must be obeyed, on pain of criminal contempt, until it is reversed by orderly and proper proceedings. *Worden v. Searls*, supra, at 27; *Howat v. Kansas*, 258 U. S. 181, 189; *United States v. United Mine Workers*, supra, at 293. In the *United Mine Workers* case it was established that even an order issued in excess of jurisdiction must be obeyed pending the determination of the question of the court's jurisdiction, at least where the jurisdictional question is a substantial and not merely a frivolous question and consequently that persons violating such an order pending such determination are guilty of and subject to be punished for criminal contempt. *United States v. United Mine Workers*, supra, at 294; *Carter v. United States*, supra, at 862.

Of all the cases cited in this brief none are closer in point, as far as the pending contempt proceedings are concerned, than the two cases last cited. The particular significance of those cases for the purposes of this brief is that even the determination of the issues in this case in favor of the appellants and the issuance of a writ of prohibition as prayed for would not preclude the prosecution of the contempt proceedings.

There remains the question whether the rule of the *United Mine Workers* case obtains in the territorial courts, it being a matter of local law. See *Decision upon Motion for Determination of Defenses in Advance of Trial*, filed December 4, 1947 in *Alesna v. Rice*, Civil No. 769, United States District Court for the District of Hawaii (Ans. Br., Appendix C, at xl). There are a number of decisions of the

Supreme Court of the Territory concerning contempt of orders void for want of jurisdiction, which will be briefly considered, but none contrary to the *United Mine Workers* case.

In *Ex parte Pahia*, 13 Haw. 575, an order to reconvey certain property and the commitment for disobedience of such mandate were held void for lack of jurisdiction. The case clearly involved a civil contempt, as shown by the fact that the commitment was for the purpose of coercing compliance with the order to reconvey. 13 Haw. at 578. Furthermore, the contempt judgment was entirely without foundation in that there was no pleading invoking the jurisdiction of the court for contempt proceedings or any process giving the court jurisdiction over the person adjudged in contempt. 13 Haw. at 581.

In *Dole v. Gear*, 14 Haw. 554, it was held that contempt proceedings to compel alimony payments are subject to be stayed by writ of prohibition pending appeal from the order for alimony. Obviously the case involved only a civil contempt.

Similarly, *Andrews v. Whitney*, 21 Haw. 264, wherein a writ of prohibition was issued to stay proceedings for enforcement of a void order for payment of alimony, was a case of civil contempt, the contempt proceedings having been instituted upon motion of the libelee. 21 Haw. at 265.

In *Sakan v. Ashford*, 23 Haw. 267, a writ of prohibition sought to stay contempt proceedings for violation of an order issued in a suit to establish and enforce a constructive trust was denied on the ground that it was not shown that the court was without jurisdiction. Hence, the statements on the subject of the enforcibility of void orders are mere dicta. There is also the distinction that the case involved only a possible civil contempt.

In one case, however, *Rose v. Ashford*, 22 Haw. 469, a criminal contempt was involved and a writ of prohibition was issued staying the contempt proceedings. The case in-

volved the question of the validity of an order issued by a court alleging a failure on the part of the respondent sheriff to execute promptly a warrant of arrest, the making of a false return of the warrant and failure to comply with a request of the court that he appear before the court to explain the delay in service and ordering him to appear on a day certain to show cause why he should not be adjudged in contempt. Citing the rule that in cases of constructive contempt, such as that alleged in the order, it is necessary, in order to give the court jurisdiction to proceed for contempt, that a formal statement of some sort, such as an affidavit, complaint or information, stating the facts be filed as the basis upon which attachment may issue (22 Haw. at 472), the Supreme Court of Hawaii held that the order was void and the court was without jurisdiction to proceed in contempt for the reason that no such statement was filed. As in *Ex parte Pahia*, supra, the gist of the case is that in a case of constructive contempt the court cannot proceed unless its jurisdiction has been properly invoked. The case is clearly distinguishable from the *United Mine Workers* case and likewise as to the contempt proceedings now pending before the appellee circuit judge, which were instituted by a formal information (Appendix).

It is, therefore, respectfully submitted that the decisions of the Supreme Court of Hawaii are not in conflict with the *United Mine Workers* decision, and that the rule of that case is applicable to the pending contempt proceedings.

CONCLUSION

We respectfully submit that for the reasons stated in the Answering Brief of Appellee Maui Agricultural Company, Limited, which we adopt, the decision of the Supreme Court of the Territory of Hawaii should be affirmed and further that in no event should the prosecution of the contempt proceedings pending before the appellee circuit judge be stayed.

Dated: Honolulu, Territory of Hawaii, this 17th day of January, 1948.

Respectfully submitted,

WALTER D. ACKERMAN, JR., Attorney
General of the Territory of Hawaii;
RHODA V. LEWIS, Assistant Attorney
General; MICHIRO WATANABE, Deputy
Attorney General, Attorneys for Appel-
lee Cable A. Wirtz, Judge of the Circuit
Court of the Second Circuit, Territory
of Hawaii,

By Michiro Watanabe

APPENDIX

IN THE

Circuit Court of the Second Circuit

TERRITORY OF HAWAII

AT CHAMBERS

IN EQUITY

327

In the Matter of the Contempt of Court
of: BENJAMIN AWANA, SEICHI DOI,
ERNEST FERNANDEZ, GEORGE FERNAN-
DEZ, FRANK FRANCO, LIONEL HANA-
KAHI, KOICHI ITO, BEN KAHAAWINUI,
JOSEPH KAHOLOKULA, LIWAI KEALOKA,
HARRIS YOSHIO NAGATA, RAFAEL PERRY,
CHARLES REBERA, HITOSHI SERA, and
TAKESHI SHIMANO.

SUMMARY
CONTEMPT
PROCEEDINGS

INFORMATION

IN THE Circuit Court of the Second Circuit

TERRITORY OF HAWAII

AT CHAMBERS

IN EQUITY

327

In the Matter of the Contempt of Court
of: BENJAMIN AWANA, SEICHI DOI,
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DEZ, FRANK FRANCO, LIONEL HANA-
KAHI, KOICHI ITO, BEN KAHAAWINUI,
JOSEPH KAHOLOKULA, LIWAI KEALOHA,
HARRIS YOSHIO NAGATA, RAFAEL PERRY,
CHARLES REBERA, HITOSHI SERA, and
TAKESHI SHIMANO.

SUMMARY
CONTEMPT
PROCEEDINGS

INFORMATION

And now comes the TERRITORY OF HAWAII, by Wendell F. Crockett, Deputy County Attorney of the County of Maui, and, complaining of the respondents mentioned by name in paragraph 4 of this Information, represents to the Court:

1. That at all times mentioned herein there was and still is pending in this Court a certain equity proceeding for injunction entitled "MAUI AGRICULTURAL COMPANY, LIMITED, Petitioner, vs. INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION (CIO), et al.", being Equity No. 325, wherein a Temporary Restraining Order was made and issued on October 17, 1946, which Restraining Order at all times mentioned herein was and is still in effect, a true copy of which said Order is attached hereto, marked Exhibit "A" and incorporated herein by reference.

2. That on the 17th day of October, 1946, said Temporary Restraining Order was duly served upon respondents Benjamin Awana, Seichi Doi, Ernest Fernandez, George Fernandez, Frank Franco, Lionel Hanakahi, Koichi Ito, Ben Kahaawinui, Joseph Kaholokula, Liwai Kealoha, Harris Yoshio Nagata, Rafael Perry, Charles Rebera, Hitoshi Sera and Takeshi Shimano, all being respondents mentioned in or covered by said Order.

3. That notice of said Temporary Restraining Order was further given generally to the entire community in Paia, County of Maui, Territory of Hawaii, and elsewhere upon said Island of Maui, by publication of the fact of the issuance of said Order and of the substance of said Order in the late or afternoon editions on October 17, 1946, and in the October 18, 1946 editions of the Honolulu Advertiser and the Honolulu Star-Bulletin, both being newspapers printed and published in Honolulu, City and County of Honolulu, Territory of Hawaii, having a general circulation throughout said Territory, including said Island of Maui, all of which said newspaper editions are usually and were actually delivered and distributed on said Island of Maui on the date of issue thereof, and also by radio announcements on the afternoon and evening of October 17 and the morning of October 18, 1946, over radio stations serving and customarily heard by the inhabitants of said Island.

4. That, notwithstanding that the persons hereinafter named as alleged violators of said Order had due notice of said Order and the contents thereof, as hereinabove set forth, a large number of persons, being members of International Longshoremen's and Warehousemen's Union (CIO), and some of them being members of Local 144 of the International Longshoremen's and Warehousemen's Union (CIO), and some of them being members of Unit 1, Local 144, International Longshoremen's and Warehousemen's Union, and of other persons acting in concert with

them, in excess of one hundred ninety-four persons, and including, the following named persons:

Benjamin Awana	Joseph Kaholokula
Seichi Doi	Liwai Kealoha
Ernest Fernandez	Harris Yoshio Nagata
George Fernandez	Rafael Perry
Frank Franco	Charles Rebera
Lionel Hanakahi	Hitoshi Sera
Koichi Ito	Takeshi Shimano
Ben Kahaawinui	

and many others whose names are at present unknown to said Deputy County Attorney, on the morning of October 18, 1946, under the fraudulent pretense and guise of holding an alleged parade, in open and willful violation of said Restraining Order and in open and willful defiance and contempt of said Order and of this Court, did engage in mass picketing in numbers in excess of one hundred ninety-four persons, and did congregate in crowds, on and near the premises of said Maui Agricultural Company, Limited, petitioner in said injunction proceeding (Equity No. 325 aforesaid), at said Paia, with intent to, and did then and there, interfere with the ingress to and egress from said Petitioner's mill, and other plantation buildings located at said Paia by said Petitioner, its employees and others who might desire entrance to said premises for the purpose of performing work and for other occasion, and did then and there threaten violence and use coercion and intimidation by force of numbers and otherwise by unlawful means upon said Petitioner's employees and others lawfully attempting to enter upon and proceed to and from said Petitioner's said premises.

WHEREOF, the said Deputy County Attorney, for and on behalf of the said Territory, moves this Court for a rule upon the defendants

Benjamin Awana
 Seichi Doi
 Ernest Fernandez
 George Fernandez
 Frank Franco
 Lionel Hanakahi
 Koichi Ito
 Ben Kahaawinui

Joseph Kaholokula
 Liwai Kealoha
 Harris Yoshio Nagata
 Rafael Perry
 Charles Rebera
 Hitoshi Sera
 Takeshi Shimano

to be and appear before this court, on a day to be named, and show cause, if any they or any of them have, why they should not be adjudged guilty of and punished for contempt of this Court in respect of each and all of the afore-said contemptuous acts.

DATED: Wailuku, Maui, T. H., this 7th day of November, 1946.

(Sgd.) WENDELL F. CROCKETT
 Deputy County Attorney of the
 County of Maui

[*Note:* The exhibit referred to in paragraph 1 of the foregoing Information has been omitted. It is included in the Record at pages 36 and 39.]

